In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 960

SAM (SALVATORE) DI PIAZZA, PETITIONER

v.

UNITED STATES OF AMERICA

No. 965

WILLIAM CLYDE DEMING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. No. 960, 14–42; Pet. App. No. 965, 26–28) are reported at 415 F. 2d 99 and 415 F. 2d 111.

JURISDICTION

The judgments of the court of appeals were entered on September 11, 1969. Petitions for rehearing were denied on November 18, 1969. The petition for a writ

of certiorari in No. 960 was filed on December 17, 1969, and in No. 965 on December 18, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the holdings in *Marchetti* v. *United States,* 390 U.S. 39, and *Grosso* v. *United States,* 390 U.S. 62, require the exclusion of evidence seized prior to the date of those decisions under search warrants based on affidavits asserting violations of both the federal wagering tax laws and 18 U.S.C. 1952, which prohibits the use of interstate facilities in aid of illegal gambling activities (No. 965).

2. Whether the affidavits supporting the search warrants provided sufficient probable cause for their issuance (No. 965).

3. Whether Section 605 of the Federal Communications Act of 1934 prohibits the telephone company from disclosing toll records of long distance calls to the Internal Revenue Service in response to a summons issued under 26 U.S.C. 7602 (Nos. 960, 965).

STATEMENT

In an indictment returned in the United States District Court for the Southern District of Ohio, petitioners, together with one Otto Kuhn (petitioner in No. 1096 Misc., this Term) were charged with the use of interstate facilities to promote an illegal gambling enterprise and with conspiracy, in violation of 18 U.S.C. 371 and 1952. On motion, the case was severed for trial. Petitioners Di Piazza and Deming were convicted by one jury on seven substantive counts and on one con-

spiracy count, and were sentenced to a total of ten years' imprisonment and fined $50,000. Deming was also convicted along with Kuhn by a second jury on five substantive counts and on a different conspiracy count. Deming was sentenced to a total of ten years' imprisonment and fined $5,000.

The evidence (the sufficiency of which is not challenged) at the separate trial of Di Piazza and Deming is set forth in the opinion below relating to that case (Pet. App. No. 960, 15–18; Pet. App. No. 965, 29–32). It showed a large-scale, interstate bookmaking operation, illegal in character, which in 1966 made extensive use of telephones. Di Piazza was based primarily in New Orleans; Deming at 4808 Woodford Road in Cincinnati as well as at his residence in Fort Thomas, Kentucky. As the opinion details, search warrants executed on July 22, 1966, at the Cincinnati address and at the Fort Thomas residence of Deming resulted in the seizure of gambling records and paraphernalia (Di Piazza Document App. 39a–43a, 45a–49a).[1]

Both affidavits to support the searches of the two premises occupied by Deming in Cincinnati and Fort Thomas were signed by an agent of the Internal Revenue Service and alleged violations of the federal wagering tax statute and 18 U.S.C. 1952, prohibiting the use of interstate facilities to promote an illegal gambling activity. The affidavit showed that in February 1966 the Cincinnati office of the IRS received

[1] "Di Piazza Document App." refers to a special appendix filed by petitioner Di Piazza in the court below containing what he termed "relevant documents"; a copy of this is on file with the Clerk of this Court.

information that suspected bookmakers in Las Vegas were calling Cincinnati telephone number 791–4793 listed to a "Harry Acker" at 3808 Woodford Road, and that in June 1966 a special agent had placed bets with a person at Lexington, Kentucky, telephone numbers 255–2592 and 255–7933. Toll call slips showed calls between the Woodford number and the Lexington numbers, between the Woodford number and a particular person having a wagering tax stamp in Louisville, and between the Woodford number and Sam Di Piazza who was described as a nationally known gambler. It was also alleged that William Clyde Deming, a person who in 1962 had a federal wagering tax stamp and had been arrested for wagering tax violations, was seen at the Woodford address on eight occasions; that toll records of Deming's home telephone between January 1966 and May 1966 showed 34 calls to the Lexington numbers; and that Deming had no current federal wagering tax stamp. One of the affidavits in addition stated that Deming had been convicted of federal wagering tax violations (Di Piazza Document App. 39a–43a, 45a–49a).[2]

The evidence at the separate trial of Deming and Kuhn also showed wide-scale, interstate gambling activity, similarly illegal in nature, with Deming operat-

[2] That affidavit also stated that an investigation had revealed that the Harry Acker telephone listing at Woodford Road was fictitious and that toll slips for the Woodford number between April and July 1966 showed over 350 telephone toll calls to known bookmakers and to persons suspected of being bookmakers.

ing in Cincinnati and Kuhn in Fort Thomas, Kentucky. In that case the government introduced evidence resulting from the same two search warrants and from a third warrant executed at the residence of Kuhn in Lexington. The search warrant for Kuhn's residence did not allege a violation of 18 U.S.C. 1952.

ARGUMENT

1. The affidavits supporting the two warrants to search the premises occupied by petitioner Deming contained facts showing violations of both the wagering tax provisions of the Internal Revenue Code and of 18 U.S.C. 1952, a separate statute forbidding the use of interstate facilities to carry on an illegal gambling business. These two warrants also specified that there was probable cause to believe that both of these statutory provisions had been and were being violated (Di Piazza Document App. 39a–49a). These warrants are, therefore, unlike the warrant issued to search the premises occupied by Deming's co-defendant Kuhn which resulted in the seizure of objects introduced at the Deming-Kuhn trial, since it referred only to wagering tax law violations.[3] Even if the reference to the federal wagering tax laws in the two Deming warrants would render them defective if that was the sole statutory violation upon which the warrants were based, the warrants involved here are supported by the alleged violation of 18 U.S.C. 1952.

[3] As to the third search warrant, involved in Kuhn's petition (No. 1096 Misc., this Term) and relating to Deming's separate conviction here, the government is suggesting that action be deferred pending decisions in various cases involving the retroactivity of *Marchetti* v. *United States*, 390 U.S. 39.

When an affidavit for a warrant contains both proper and improper grounds, it is sufficient if the proper grounds—here the use of interstate telephone to carry on unlawful gambling—are sufficient to support a finding of probable cause. See *Chin Kay* v. *United States*, 311 F. 2d 317, 321–322 (C.A. 9); *Silbert* v. *United States*, 282 F. Supp. 635, 644–645 (D. Md.); *United States* v. *Epstein*, 240 F. Supp. 80 (S.D.N.Y.).

2. As the court below properly held (Pet. App. No. 960, 24–27), the affidavits supporting the warrants were sufficient under the principles of *Spinelli* v. *United States*, 393 U.S. 410, and *Aguilar* v. *Texas*, 378 U.S. 108. See also *United States* v. *Ventresca*, 380 U.S. 102. The United States Commissioner was told that a government investigator had placed telephone bets with an individual who in turn was calling and was called from the telephone numbers of the two Deming premises which were raided. Added to this is the information that suspected Las Vegas bookmakers had called one of the Deming numbers, that Deming formerly had a wagering tax stamp and that there were toll calls between this Deming number and a holder of a current wagering tax stamp. Under these circumstances, the Commissioner could properly find probable cause to believe that petitioners were using interstate facilities in aid of gambling.

3. The examination of telephone company records by IRS agents under a summons issued under 26 U.S.C. 7602 during the investigation which led to the issuance of the search warrant did not violate the first clause of Section 605 of the Communications Act (47 U.S.C. (Supp. IV) 605). Section 7602 of the Internal Revenue Code authorizes the Treasury Department to

summon "any person having possession, custody, or care of books of account containing entries" relating to the tax liability of any person in order to make a tax return where none has been filed or to determine a possible tax liability. As pointed out in the government's memorandum opposing a rehearing in *Covello* v. *United States,* No. 240, this Term (a copy of which we are furnishing to counsel for petitioners herein), Section 605, assuming that it is applicable to telephone company accounting records at all, authorizes disclosure not only under subpoena, but on "demand of other lawful authority" (see Pet. App. No. 960, 20–23). A summons under Section 7602 is clearly a "demand of other lawful authority" as that term is used in Section 605.

Nor was there, as petitioners contend, an abuse of the administrative summons to obtain third party records under Section 7602. As the court below held, a summons under this statute is a proper device for obtaining records where the investigation may produce evidence for use in both civil and criminal proceedings (Pet. App. No. 960, 21). At the initial stage of the investigation, when the telephone company was summoned to produce its accounting records, the results of the investigation could not be clearly foreseen. The nature of illegal wagering activities is such that an investigation by a special agent has sometimes been a necessary prerequisite to the assessment of a civil tax liability based on the wagering tax statutes. Without his evidence that a person is engaged in a gambling business, no civil tax liability could be established.[4] To be sure, in different circumstances the ap-

[4] Cf. *Washington* v. *United States,* 402 F. 2d 3 (C.A. 4), pending on petition for a writ of certiorari, No. 22, this Term.

pearance of a special agent, following the audit of records by a revenue agent to determine the correctness of an income tax return, may signal the commencement of a criminal investigation. But that was not the situation here. Thus *Reisman* v. *Caplin*, 375 U.S. 440, 449, cited by the dissent below, is not to the contrary. Indeed, this Court, in stating that a governmental purpose to obtain evidence for use in a criminal case may constitute a defense to a summons, relied on *Boren* v. *Tucker*, 239 F. 2d 767 (C.A. 9), a case which upheld the right of a special agent to enforce an administrative summons.

Finally, as also pointed out in our memorandum in *Covello*, Section 605 does not cover telephone company toll records because its restrictions are limited to persons engaged in receiving and transmitting communications and does not include employees of communication carriers, such as accounting officers. For this reason, telephone company accounting records are entitled to the same treatment as records of other businesses. See *Nolan* v. *United States*, No. 9730 (C.A. 10), decided November 10, 1969.

CONCLUSION

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

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